



Circuit Court Breakout:

A Round-Up of Recent Fifth and Eleventh Circuit Precedent

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Round-Up of Recent Fifth and Eleventh Circuit Precedent

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By the completion of this session, you should:

- Be familiar with relevant circuit court precedent in immigration proceedings;
- Understand any new analytical frameworks or standards required by the circuit courts for immigration issues; and
- Know what precedent has been recently issued by the Fifth and Eleventh Circuits on immigration topics.



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Recent Fifth Circuit Precedent

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Recent Fifth Circuit Precedent
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Asylum, Withholding, Convention against Torture

- *Cabrera v. Sessions*, No. 15-60711, --- F.3d ---, 2018 WL 2106621 (5th Cir. May 7, 2018).
 - The Board erred in requiring Cabrera to prove past persecution in order to establish a claim based on a fear of future persecution; in mischaracterizing the PSG claimed by Cabrera; and in failing to meaningfully consider all the relevant evidence supporting Cabrera's PSG.
- *Morales v. Sessions*, 860 F.3d 812 (5th Cir. 2017).
 - Past persecution experienced by the petitioner's mother cannot be imputed to the petitioner, a 10 year-old girl from El Salvador.
- *Iruegas-Valdez v. Lynch*, 846 F.3d 806 (5th Cir. 2017).
 - The Fifth Circuit vacated the BIA's decision and remanded for the agency to consider the external evidence under the under color of law legal standard. *Garcia v. Holder*, 756 F.3d 885, 893 (5th Cir. 2014).

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Recent Fifth Circuit Precedent

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Cancellation of Removal

- *Calvillo Garcia v. Sessions*, 870 F.3d 341 (5th Cir. 2017).
 - A sentence of up to one year confinement in a substance-abuse felony punishment facility as a condition of probation constituted a “term of imprisonment” under section 101(a)(48)(B) of the Act.

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Recent Fifth Circuit Precedent

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Criminal Cases in the Immigration Context

- *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018).
 - Texas’s burglary statute, Texas Penal Code § 30.02, is indivisible because subsections (1) and (3) are separate means of committing one burglary offense.
 - Texas Penal Code § 30.02(a)(3) does not correspond to the generic definition of burglary.

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Recent Fifth Circuit Precedent
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Criminal Cases in the Immigration Context (continued)

- *Villegas-Sarabia v. Sessions*, 874 F.3d 871 (5th Cir. 2017).
 - 18 U.S.C. § 4, misprision of felony, is categorically a CIMT because it requires an affirmative act to conceal a crime, which “necessarily entails deceit.”
 - 8 U.S.C. §§ 1401(a)(7), 1409(a), (c): disparate residency requirements applicable to unwed U.S.-citizen mothers vis-à-vis fathers violates the Fifth Amendment's guarantee of equal protection.
 - 8 U.S.C. § 1401: general residency requirement should apply to children born to unwed U.S.-citizens, both mothers and fathers.

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Recent Fifth Circuit Precedent
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Criminal Cases in the Immigration Context (continued)

- *United States v. Perlaza-Ortiz*, 869 F.3d 375 (5th Cir. 2017).
 - Texas Penal Code § 22.05(b), discharging a firearm in the direction of an individual or habitation, is not divisible as its subsections provide alternate means for committing the same offense of deadly conduct.
- *United States v. Martinez-Rodriguez*, 857 F.3d 282 (5th Cir. 2017).
 - Texas Penal Code § 22.04(a), injury to a child, is indivisible as its alternative components are means and not elements.
 - Texas Penal Code § 22.04(a) is not categorically a crime of violence under 18 U.S.C. § 16.
 - Texas Penal Code § 22.04(a), therefore, does not amount to an aggravated felony, as defined in INA § 101(a)(43).

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Recent Fifth Circuit Precedent
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Criminal

- *Shroff v. Sessions*, No. 17-60042, —F.3d —, 2018 WL 2222659 (5th Cir. May 15, 2018).
 - Texas Penal Code § 33.021(c), online solicitation of a minor, is overbroad and does not qualify as sexual abuse of a minor for purposes of removability.
- *United States v. Johnson*, 880 F.3d 226 (5th Cir. 2018).
 - Mississippi armed carjacking statute, Miss. Code Ann. § 97-3-117, is a crime of violence under the U.S. Sentencing Guidelines.
- *Laryea v. Sessions*, 871 F.3d 337 (5th Cir. 2017).
 - Texas Penal Code § 38.04, evading arrest or detention, is a divisible statute because its subparts articulate different crimes.

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Recent Fifth Circuit Precedent
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Other

- *Nunez v. Sessions*, 882 F.3d 499 (5th Cir. 2018).
 - Proper notice of removal proceedings does not require the alien or a responsible household member to actually view or sign the notice.
 - Motion to reopen based on changed country conditions requires “a meaningful comparison” between the conditions at the time of the removal hearing and at the time of filing the motion to reopen. The change must be material, not “merely incremental.”
- *Gonzalez-Cantu v. Sessions*, 866 F.3d 302 (5th Cir. 2017).
 - When a respondent’s argument for equitable tolling is related to a change in law, an IJ should consider the date the respondent discovered the change and determine if the MTR was filed within 90 days of that date.

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Recent Eleventh Circuit Precedent

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Recent Eleventh Circuit Precedent
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Asylum, Withholding, Convention against Torture

- *Sama v. Att'y Gen. of U.S.*, 887 F.3d 1225 (11th Cir. 2018).
 - Substantial evidence supported the finding that Petitioner did not demonstrate past persecution or a well-founded fear of future persecution, where the Cameroonian police had issued a warrant for Petitioner's arrest, charging him with promotion of and carrying out homosexual activities.
 - Petitioner's due process rights were not violated because he was afforded notice, a hearing, and there is no requirement that the BIA or IJ address each piece of evidence presented.

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Recent Eleventh Circuit Precedent
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Adjustment of Status and Waivers

- *Arevalo v. Att’y Gen. of U.S.*, 872 F.3d 1184 (11th Cir. 2017).
 - The Eleventh Circuit denied the petition for relief and granted *Chevron* deference to the Board’s interpretation of section 212(h) of the Act in *Matter of Y-N-P-*, 26 I&N Dec. 10 (BIA 2012), which held that an applicant for special rule cancellation of removal cannot use section 212(h) to waive her inadmissibility under section 212(a)(2) of the Act and overcome the bar to relief under section 240A(b)(2)(A)(iv) of the Act.

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Recent Eleventh Circuit Precedent
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Criminal Cases in the Immigration Context

- *Cintron v. Att’y Gen. of U.S.*, 882 F.3d 1380 (11th Cir. 2018).
 - The Eleventh Circuit granted the petition for relief and remanded, concluding that petitioner’s conviction in violation of Fla. Stat. § 893.135(1)(c) (drug trafficking offense) does not disqualify her from cancellation of removal because the statute is indivisible and categorically overbroad and therefore does not qualify as an aggravated felony.
- *Pierre v. Att’y Gen. of U.S.*, 879 F.3d 1241 (11th Cir. 2018).
 - The Eleventh Circuit held that a battery of a child conviction under section 784.085 of the Florida Statutes categorically qualifies as a crime of child abuse and a CIMT.

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Recent Eleventh Circuit Precedent
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Criminal Cases in the Immigration Context (continued)

- *Choizilme v. U.S. Att’y Gen.*, 886 F.3d 1016 (11th Cir. 2018).
 - The Eleventh Circuit held that a conviction for sale of cocaine in violation of section 893.13(1)(a)(1) of the Florida Statutes qualifies as an illicit-trafficking aggravated felony under the INA.
- *Gordon v. Att’y Gen. of U.S.*, 861 F.3d 1314 (11th Cir. 2017).
 - Applying the categorical and modified categorical approach, Petitioner’s conviction under section 893.13(1)(a) of the Florida Statutes for sale or delivery, for monetary consideration, of cannabis does not constitute an aggravated felony and therefore does not render him removable under INA § 237(a)(2)(A)(iii).
- *Spaho v. U.S. Att’y Gen.*, 634 F.3d 1333 (11th Cir. 2016).
 - Section 893.13(1)(a)(1) of the Florida Statutes is a divisible statute.

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Criminal Cases in the Immigration Context (continued)

- *Gelin v. U.S. Att’y Gen.*, 837 F.3d 1236 (11th Cir. 2016).
 - A conviction for abuse of an elderly person or disabled adult under section 825.102(1) of the Florida Statutes is categorically a CIMT because the least culpable conduct necessary to sustain a conviction under section 825.102(1) constitutes a CIMT.

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Recent Eleventh Circuit Precedent
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Criminal

- *United States v. Joyner*, 882 F.3d 1369 (11th Cir. 2018)
 - Convictions for resisting an officer with violence in violation of Fla. Stat. § 843.01 and attempted strong arm robbery in violation of Fla. Stat. §§ 812.13(1), (2)(c) are categorical crimes of violence pursuant to 18 U.S.C. § 924(e)(2)(B)(i).
- *In re Welch*, 884 F.3d 1319 (11th Cir. 2018).
 - The Eleventh Circuit determined that Alabama's first degree assault, Ala. Code. § 13A-6-20(a)(1), is a crime of violence under the "elements" clause of the ACCA's 18 U.S.C. § 924(e)(2)(B), which is analogous to 18 U.S.C. § 16(a). Specifically, the court found that the statute's requirement of serious physical injury could not be accomplished without the use of physical force.

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Recent Eleventh Circuit Precedent
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Criminal (continued)

- *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017).
 - On rehearing en banc, the Eleventh Circuit affirmed the sentencing enhancement of the district court, concluding that Fla. Stat. Ann. § 784.041 (felony battery) constitutes a crime of violence under the elements clause of USSG § 2L1.2(b)(1)(A)(ii) (same as 18 U.S.C. § 16(a)).

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Recent Eleventh Circuit Precedent
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Criminal (continued)

- *United States v. Davis*, 875 F.3d 592 (11th Cir. 2017).
 - The Eleventh Circuit held that Alabama's first degree sexual abuse statute in violation of Alabama Code § 13A-6-66 was divisible.
 - The Court also found sexual abuse by forcible compulsion indivisible and not a violent felony under the elements of clause of the Armed Career Criminal Act (ACCA) as the sexual contact element could be satisfied by the merest touching, and the forcible compulsion element included an implicit threat not of violence but of some sort of disciplinary action, or taking advantage of a child who assumed that the conduct was acceptable, or because the child did not have the capacity to refuse.

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Recent Eleventh Circuit Precedent
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Criminal (continued)

- *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017).
 - Attempted carjacking under 18 U.S.C. § 2119(1) categorically qualifies as a crime of violence under § 924(c)(3)(A) under the use-of-force and risk-of-force clauses.
- *United States v. Garcia-Martinez*, 845 F.3d 1126 (11th Cir. 2017).
 - The 2009 Florida Statute for second degree burglary of a dwelling (Fla. Stat. § 810.02(3)) is not divisible, as it contains alternative means rather than elements of committing the offense. Therefore, the district court erred by applying the modified categorical approach to determine that the petitioner's conviction constituted a crime of violence under U.S. Sentencing Guidelines § 2L1.2(b)(1)(A)(ii).

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Recent Eleventh Circuit Precedent
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Other

- *Levy v. Att'y Gen. of U.S.*, 882 F.3d 1364 (11th Cir. 2018).
 - The Eleventh Circuit granted the petition for panel rehearing, withdrew its previous decision and concluded that petitioner's Fifth Amendment rights were not violated because former section 321(a) of the Act (1985) does not discriminate based on gender or legitimacy. The Court also rejected the petitioner's argument that former section 321(a) "unconstitutionally burdens his fundamental right to maintain a family unit."

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"So here we go down the rabbit hole again to a realm where we must close our eyes as judges to what we know as men and women. It is a pretend place in which a crime that the defendant committed violently is transformed into a non-violent one because other defendants at other times may have been convicted, or future defendants could be convicted, of violating the same statute without violence. Curiouser and curiouser it has all become, as the holding we must enter in this case shows. Still we are required to follow the rabbit."

-*United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017).

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